



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.719 OF 2014

JOSEPH MUNENE MURAGE.....CLAIMANT

VERSUS

SALOME NDUNG’U.....RESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful dismissal of the Claimant and refusal to pay terminal dues.
2. On 3rd December 2015, parties were in Court for hearing but hearing could not commence as there were other scheduled matters. A hearing date was allocated in Court in the presence of both parties for 23rd February 2016. On the due date the Respondent was absent. Hearing proceeded with the claimant’s case as the hearing date was allocated in Court with approval of both parties.

Claim

3. The Claimant being an adult male was employed by the Respondent female adult as her private home in Nairobi on 17th may 2011 as a Gardener, caretaker and security guard. His monthly salary was Kshs.8, 200.00. No contract of employment was issued and the salaries were not accompanied by any pay slip of payment statement. The claimant’s duties included cleaning the residential premises and compound and guarding it. He would report to work at 6am and work until 6pm until Saturday. The Claimant worked diligently until 4th August 2012 when the Respondent alleged that the Claimant had stolen her granite and therefore terminated his employment without notice or payment of terminal dues. The due salary for July 2012 was not paid. The Claimant was not housed by the Respondent or paid a house allowance. The dismissal was verbal and without any reasons.

4. The Claimant reported the matter to the labour Officer but the Respondent failed to oblige.

5. The Claimant was underpaid for the 14 months he worked for the Respondent and is demanding the unpaid dues. The dismissal was without hearing or being given reasons in writing and therefore unfair. The Claimant is seeking compensation and his terminal dues; salary for July 2012 at kshs.8, 200.00;

- a. Salary for days worked in August 2012 at kshs.2, 277.00;
- b. Notice pay at kshs.8, 580.00
- c. Annual leave at kshs.7, 979.00
- d. Prorated leave for 2 months at Kshs.1, 328.00
- e. Underpayments at kshs.6, 288.00
- f. Overtime at kshs.191, 048.00

- g. Work during public holidays all at Kshs.7, 048.00
- h. Severance pay at kshs.4, 950.00
- i. costs of the suit.

6. In evidence the Claimant testified that he hails from Kirinyaga and was employed by the Respondent as a caretaker, gardener and security guard as her Mountain View Estate, Kangemi in Nairobi. He had to rent a house in Kangemi so as to be at his place of work in good time as no accommodation was offered by the Respondent or an allowance in lieu. He would report to work at 6am and leave after 6pm for 7 days a week.

7. The Claimant also testified that on 4th August 2012 he reported to work as usual. Early morning he found the night guard waiting for him with information that he was not to let the Claimant inside the respondent's compound. The Claimant made efforts to reach her but she said that he had stolen granite. This was shocking news as every night he handed over to the night guard and the previous day there was nothing wrong when he left his place of work. Where such an item was stolen, there was no report to the police. He does not know what granite is and was never inside the house as there was a house help. The entire estate is covered by private security guards and the Respondent had a night guard who work together to ensure there is security all-round the day and night. Every time the Claimant came into the estate the security guards had to check him to ensure that he was not carrying anything not permitted. The office had not received any allegation of stolen granite.

8. The Claimant reported the matter to the estate security office but they had no knowledge of any theft within the estate. He was sent to Kabete Police station to report the matter but the police sent him to the labour office where the matter was recorded and the Respondent summoned but she refused to oblige.

9. The Claimant confirmed his claims as set out in the memorandum of claim.

Defence

10. In the statement of defence filed by the respondent, the defence is that there was no employment with the Claimant as alleged. A tenant in her apartment No.4 did complain that a person working for then by the names of the Claimant had stolen granite kitchen top and disappeared and the tenant compensated the Respondent when he vacated in November 2013. The Respondent therefore denies ever employing the Claimant or the issues set out in the claim save that it was alleged that the Claimant had stolen granite top among other things from her tenants. There was no dismissal of the Claimant as there was no employment in the first instance. There was no communication from the Minister for Labour as alleged and the tabulated due are not due. The suit should be dismissed with costs.

11. The Respondent did not attend hearing r file any witness statement and no evidence was called at all. The Respondent opted to be absent.

12. In submissions, the Claimant states that he was not given notice or reasons for his termination. Section 35 of the Employment Act was not adhered to. In the end there was no valid reason leading to his termination contrary to section 45 of the Employment Act and thus is was unlawful and unfair.

Determination

13. Section 10 of the Employment Act requires all employers to issue an employee with a written contract of employment. Where an employee is to undertake specific work, such a written contract has to state the work to be done. Where the work is on piece-rate or under fixed term contract, such is to be put into writing. Where not practically possible immediately upon employment to write the contract of employment, such is to be done within 2 months from the date of such employment. In this case the Claimant was not issue with any written contract and he continued to work for a period of over 2 months and by operation of the law and pursuant to section 37 of the Employment Act, he became a full time employee of the respondent.

14. The Respondent has denied employing the claimant. However, at paragraph 5 and 6 of the defence, the Respondent avers that the Claimant was employed in her apartment serving tenants. By implication, where the Respondent owned the apartment where the Claimant was the caretaker, gardener and security guard, she knew of his employment. Had the case been different, when the Respondent was served with summons, she would have ensured that those who employed the Claimant in her own compound and apartments were appropriately joined herein. Therefore, in the absence of any other evidence to the contrary, the Respondent being the owner of the premises where the Claimant served, she became the employer.

15. It is trite that whatever the reason(s) for terminating an employee, even in cases of gross misconduct, section 41 of the Employment Act applies. Such is to ensure due process, natural justice and protection of the rights of the employee are guaranteed. The law requires that before effecting any termination of an employee, the employer must issue notice and hear the employee in their defence. Where this is not practically possible due to the nature of offence or charge against the employee, then the employer must set out the exceptional circumstances leading to the summary action without notice or hearing the affected employee. In this case I find no evidence to challenge the claimant. To therefore fail to abide by the procedural requirements of the law, the resulting termination becomes unlawful.

16. Equally, the employer must give an employee the reasons that have led to their termination of employment. Such reason must be fair and valid and based on genuine reasons that exist at the time of termination. Such reason must be weighed in terms and the sanction given in return. Where there are no written reasons indicating why the employer deemed it necessary to effect the termination, there then lacks justifiable cause for the termination pursuant to the provisions of section 45 of the Employment Act making the same unfair.

17. Where there is unfair termination of employment the Court is guided at section 49 of the Employment Act to grant compensation. The Claimant testified that he was underpaid. Indeed the Regulation orders and Wage Guidelines requires that an employee working in multiple areas such as the claimant, being a gardener, caretaker and security guard, should be compensated for his labour. As such the Claimant is awarded maximum allowed compensation of 12 months' salary based on the minimum wage at Kshs.9, 867.00 all being Kshs.118, 404.00.

18. The Claimant testified that he worked throughout the week for 7 days and started work at 6am to 6pm when the night guard would take over from him. Such was not compensated especially for the overtime hours served. As such, for the duties allocated, the Claimant was required to work for 52 hours per week and the rest ought to have been paid at 1.5 rate for every extra hours worked. In this case therefore in a week the Claimant worked for a total of 84 hours instead of 52 this being an extra 32 hours. For the 14 months served, in total the Claimant worked for 1,792 hours overtime. On the basic pay due Dn noting the overtime hours, the Claimant is entitled to an overtime pay of Kshs.110, 510.00.

19. Notice pay is due where termination notice was not given or paid for. Such is awarded in accordance with section 35 of the Employment Act at the rate of one 910 months' salary. The Claimant is awarded Kshs.9, 867.00.

20. Salary for July 2012 was not paid. The Claimant was also terminated on 4th august 2012 without pay. Where such dues were paid, the Respondent did not issue the Claimant with a payment slip or statement of payment. The sum of Kshs.11, 182.60 is due.

21. Underpayment of any employee contrary to the government set wage limit is unlawful. Save for the criminal sanctions due, any wages not remitted is due. The Claimant is awarded Kshs.6, 288.00 for the underpayments.

22. The Claimant is seeking payment for work during public holidays. Such are days set out clearly in law but different each year due to religious holidays that are gazetted each year. These dates are not stated to amount to 13 as set out in the claim. Without such clarity, the Claimant left this part not addressed. Such claim is declined.

23. The Claimant is seeking severance pay. Such pay is due under the provisions of section 40 of the Employment Act in cases of redundancy. This did not stand out as one such case that severance pay is due. Such is declined.

24. Costs are awarded to the Claimant as there was demand and notice to sue but the Respondent failed to pay the dues owing.

Judgement is hereby entered for the Claimant in the following terms;

- a. **A declaration that the Claimant was unfairly terminated;**
- b. **Complementation awarded at kshs.118,404.00;**
- c. **Overtime pay kshs.110,510.00;**
- d. **Notice pay kshs.9,867.00;**
- e. **Due salaries kshs.11,182.00;**
- f. **Underpayments kshs.6,288.00;**
- g. **The Claimant to be issued with a Certificate of Service within 14 days; and**
- h. **Costs of the suit.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF MARCH 2016

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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